Supreme Court, U.S.
FILED
JUN 30 1993
OFFICE OF THE CLERK

No. 92-1904

In The

Supreme Court of the United States

October Term, 1992

JOHN O. GUILLORY,

Petitioner,

v.

THE PORT OF HOUSTON AUTHORITY,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

REAGAN M. BROWN
Counsel of Record
JENNIFER BRUCH HOGAN
FULBRIGHT & JAWORSKI L.L.P.
1301 McKinney, Suite 5100
Houston, Texas 77010
(713) 651-5151

Attorneys for Respondent, The Port of Houston Authority

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Does the Equal Protection Clause of the Fourteenth Amendment prohibit a State from granting one level of limited immunity from tort liability for the State and state-created entities and another level of limited immunity for local municipalities?

LIST OF PARTIES

The Port of Houston Authority is a political subdivision of the state of Texas and has no subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

Cases v

Constitutional Provisions viii

Rules and Statutes viii

Miscellaneous viii

STATEMENT OF THE CASE 1

REASONS THE PETITION SHOULD BE DENIED .. 2

I. THIS IS AN ORDINARY TORT LIABILITY CASE RAISING NO SPECIAL OR IMPORTANT ISSUES 2

A. The Judgment of the Supreme Court of Texas Comports with All Federal Decisions Rejecting Equal Protection Challenges to State Tort Claims Acts 2

B. The Judgment of the Supreme Court of Texas Does Not Conflict With Decisions of Other State Courts of Last Resort 3

II. THE TEXAS TORT CLAIMS ACT'S LIMITED IMMUNITY FOR THE STATE AND STATE-CREATED ENTITIES SUCH AS THE PORT AUTHORITY DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT 7

TABLE OF CONTENTS – Continued

Page

A. The Rational Basis Test Applies 7

B. A Rational Basis Exists for a State to Establish One Level of Limited Immunity for Itself and State-Created Entities and Another Level of Limited Immunity for Municipalities 9

1. Texas has traditionally distinguished between units of government in recognizing immunity from tort claims 9

2. The Distinctions Preserved By the Texas Legislature Satisfy the Rational Basis Test 11

3. The Legitimate Government Interests Supporting the Distinctions in the Texas Tort Claims Act Are Well-Recognized .. 13

4. Drawing Demarcation Lines for Immunity According to What Function a Public Entity Serves Would Dismantle the Concept of Sovereign Immunity 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Aubertin v. Board of City Comm'rs, 588 F.2d 781 (10th Cir. 1978) 3

Bennett v. Brown County Water Imp. Dist. No. 1, 272 S.W.2d 498 (Tex. 1954) 4

Bloomer v. Boulder County Board of Comm'rs, 799 P.2d 942 (Colo. 1990) 3

Bowen v. Columbus, 349 S.E.2d 740 (Ga. 1986) 3

Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981) 3

Chandler v. Hospital Authority of Huntsville, 500 So.2d 1012 (Ala. 1986) 5

City of Austin v. Cooksey, 570 S.W.2d 386 (Tex. 1978) 9

City of Austin v. Daniels, 335 S.W.2d 753 (Tex. 1960) 9

City of Galveston v. Posnainsky, 62 Tex. 118 (1884) 10

Cohen v. Hurley, 366 U.S. 117 (1961) 9

Colorado v. De Foor, 824 P.2d 783 (Colo. 1992), *cert. denied*, 113 S.Ct. 483 (1992) 2, 3

Dandridge v. Williams, 397 U.S. 471 (1970) 7

Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) 8

Flax v. Kansas Turnpike Auth., 596 P.2d 446 (Kan. 1979) 6

Fylipoy v. Gulf Stevedore Corp., 257 F.Supp. 166 (S.D. Tex. 1966) 9

TABLE OF AUTHORITIES – Continued

Page

Gaines v. Huntsville-Madison County Airport Auth., 581 So.2d 444 (Ala. 1991) 5

Grimes v. Pearl River Valley Water Supply Dist., 930 F.2d 441 (5th Cir. 1991) 3, 13

Guillory v. Port of Houston Auth., 845 S.W.2d 812 (Tex. 1993) ..... *passim*

Heller v. Doe, No. 92-351, (U.S. June 24, 1993) 1993 WL 218271 16

Jenkins v. State of Washington, 540 P.2d 1363 (Wash. 1975) 6

Jones v. Texas Gulf Sulphur Co., 397 S.W.2d 304 (Tex. Civ. App. – Houston 1965, writ ref'd n.r.e.) 9

Kadrmas v. Dickinson Pub. Schools, 487 U.S. 450 (1988) 7

Kranson v. Valley Crest Nursing Home, 755 F.2d 46 (3d Cir. 1984) 3, 14

Lynch v. Port of Houston Auth., 671 S.W.2d 954 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.) 11, 12

Martinez v. California, 444 U.S. 277 (1980) 15

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) 7

Matthews v. Lucas, 427 U.S. 495 (1976) 8

McGinnis v. Royster, 410 U.S. 263 (1973) 8

McGowan v. Maryland, 366 U.S. 420 (1961) 8

TABLE OF AUTHORITIES – Continued

Page

Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61 (1913) 8

Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) 7

New Orleans v. Dukes, 427 U.S. 297 (1976) (per curiam) 15

Obenshain v. Halliday, 504 F.Supp. 946 (E.D. Va. 1980) 14

Peddycoart v. City of Birmingham, 354 So.2d 808 (Ala. 1978) 5

Pennell v. San Jose, 485 U.S. 1 (1988) 7

Ryszkiewicz v. City of New Britain, 479 A.2d 793 (Conn. 1984) 4

Sarradett v. University of South Alabama, 484 So.2d 426 (Ala. 1986) 6

Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983) 16

Smith v. Harris County-Houston Ship Channel Navigation Dist., 330 S.W.2d 672 (Tex. Civ. App. – Fort Worth 1959, no writ) 9

Tarrant County Hosp. Dist. v. Ray, 712 S.W.2d 271 (Tex. App. – Ft. Worth 1986, writ ref'd n.r.e.) 11

Trinity River Auth. v. Williams, 689 S.W.2d 883 (Tex. 1985) 4

Turvey v. City of Houston, 602 S.W.2d 517 (Tex. 1980) 9

Williamson v. Lee Optical Co., 348 U.S. 483 (1955) 8

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

Tex. Const. art. I, § 13 16

Tex. Const. art. XVI, § 59 ..... 4, 12

U.S. Const. amend. XIV ..... *passim*

RULES AND STATUTES

Act of April 29, 1957, 55th Leg., R.S., ch. 117, 1957 Tex. Gen. Laws 241 12

Act of June 14, 1927, 40th Leg. 1st C.S., ch. 97, 1927 Tex. Gen. Laws 256 12

Act of June 16, 1987, 70th Leg. 1st C.S., ch. 2, 1987 Tex. Gen. Laws 37 10

Sup. Ct. R. 10 2

Tex. Civ. Prac. & Rem. Code Ann. § 101.002 . 2, 4, 6-14

Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(b) (Vernon Supp. 1992) 10

Tex. Civ. Prac. & Rem. Code Ann. § 101.024 (Vernon Supp. 1992) 13

Tex. Civ. Prac. & Rem. Code Ann. § 101.025(a) (Vernon Supp. 1992) 10

Tex. Civ. Prac. & Rem. Code Ann. § 101.058 (Vernon 1986) 10

MISCELLANEOUS

Op. Tex. Att'y Gen. No. JM-742 (1987) 12

No. 92-1904

In The

Supreme Court of the United States

October Term, 1992

JOHN O. GUILLORY,

Petitioner,

v.

THE PORT OF HOUSTON AUTHORITY,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, The Port of Houston Authority (Port Authority) respectfully requests that this Court deny John O. Guillory's petition for writ of *certiorari*, seeking review of the judgment of the Supreme Court of Texas in this case. The opinion of the Supreme Court of Texas is reported at 845 S.W.2d 812 (Tex. 1993).

STATEMENT OF THE CASE

Petitioner John O. Guillory (Guillory) fails to raise any special or important reasons to warrant granting his petition for a writ of *certiorari*. The arguments made by Guillory involve issues that are well-settled and do not

involve conflicting decisions between the United States courts of appeals or other state courts of last resort. Although Guillory's statement of the case correctly describes a portion of the factual background and the procedural history, it does not in any way support his claim that the Texas Tort Claims Act violates the Equal Protection Clause of the Fourteenth Amendment.

REASONS THE PETITION SHOULD BE DENIED

I. THIS IS AN ORDINARY TORT LIABILITY CASE RAISING NO SPECIAL OR IMPORTANT ISSUES

Rule 10 of this Court permits the discretionary writ of *certiorari* to be granted "only when there are special and important reasons therefor." This Court recently rejected and equal protection challenge to a state tort claims act provision limiting damages recoverable from the state when it denied the petition for *certiorari* in *Colorado v. De Foor*, 824 P.2d 783 (Colo. 1992), *cert. denied*, 113 S.Ct. 483 (1992). Because the issues raised by Guillory's petition involve well-settled matters of tort law and do not involve conflicting federal or state decisions, the petition should be denied.

A. The Judgment of the Supreme Court of Texas Comports with All Federal Decisions Rejecting Equal Protection Challenges to State Tort Claims Acts

Three federal appellate courts have considered and rejected claims similar to the one made by Guillory. All

three courts determined that a state's decision to distinguish between governmental entities by establishing varying levels of immunity did not violate the Equal Protection Clause of the Fourteenth Amendment. *See, Grimes v. Pearl River Valley Water Supply District,* 930 F.2d 441, 444 (5th Cir. 1991); *Kranson v. Valley Crest Nursing Home,* 755 F.2d 46, 52 (3d Cir. 1984); *Aubertin v. Board of City Commissioners,* 588 F.2d 781, 785 (10th Cir. 1978). In each case, the courts held that the state statute which limited the tort liability of the state governmental entity had "some rational relationship to a legitimate state objective." *Id.*

B. The Judgment of the Supreme Court of Texas Does Not Conflict With Decisions of Other State Courts of Last Resort

Numerous state courts of last resort have likewise held, consistent with the judgment of the Texas Supreme Court, that a state legislature can establish different levels of sovereign immunity for different governmental entities. *See, e.g., Colorado v. De Foor,* 824 P.2d 783, 789-90 (Colo. 1992), *cert. denied,* 113 S.Ct. 483 (1992); *Bloomer v. Boulder County Board of Commissioners,* 799 P.2d 942, 947-48 (Colo. 1990) (upholding sovereign immunity for counties but not cities with regard to dangerous road conditions); *Bowen v. Columbus,* 349 S.E.2d 740, 741-42 (Ga. 1986) (finding that after the city of Columbus was abolished by the legislature and consolidated with the surrounding county, Columbus was deemed to be a county and to have sovereign immunity even though all other municipalities in the state had no such immunity); *Cauley v. City of Jacksonville,* 403 So.2d 379, 387 (Fla. 1981)

(holding Equal Protection Clause not violated by a statute which limits recovery against municipalities but broadens recovery allowed against state entities).

The state court decisions cited by Guillory in support of his petition either do not conflict with the judgment of the Texas Supreme Court or can be distinguished based on the legislative purpose of the statute in question. *Ryszkiewicz v. City of New Britain*, 479 A.2d 793 (Conn. 1984) concerned an attempt by the Connecticut legislature to establish a level of immunity for one particular city different from all other cities in the state. No similar distinction between identically situated governmental entities is involved in this case.

In Texas, the state constitution authorizes the legislature to create navigation districts such as The Port Authority. *See* Tex. Const. Art. XVI, § 59. Neither section 59 nor the legislation creating The Port Authority contains an immunity provision for The Port Authority different from the sovereign immunity enjoyed by all navigation districts created under section 59. Moreover, The Texas Tort Claims Act recognizes the same limited level of sovereign immunity for The Port Authority as for the state, all counties, and *all* navigation districts created by the legislature. *See Guillory*, 845 S.W.2d at 814-15. *See also Bennett v. Brown County Water Improvement District No. 1*, 272 S.W.2d 498 (Tex. 1954); *Trinity River Authority v. Williams*, 689 S.W.2d 883 (Tex. 1985). Thus, this case does not conflict with cases holding that identically situated governmental entities must be treated equally.

For this reason, the Alabama cases cited by Guillory also not conflict with the judgment of the Texas Supreme

Court. In *Gaines v. Huntsville-Madison County Airport Authority*, 581 So.2d 444 (Ala. 1991), the Alabama Supreme Court struck down a statute which provided immunity to airport authorities in certain counties but not in others. Likewise in *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala. 1978), the court upheld an equal protection challenge to a statute granting immunity to one city but not to all cities. The Port Authority, however, has the same limited immunity as that of all similarly situated governmental entities – including the state, all counties, and all navigation districts. *See Guillory*, 845 S.W.2d at 815, n.4.

In *Chandler v. Hospital Authority of Huntsville*, 500 So.2d 1012 (Ala. 1986), the Alabama court refused to uphold a patchwork legislative scheme which authorized municipalities and counties to establish public hospitals under five separate statutes, only one of which prescribed immunity from tort actions. It is hardly surprising that the hospital could offer no rational basis for the distinctions drawn by the legislature. 500 So.2d at 1016. The Port Authority's immunity, however, does not derive from some obscure or confusing legislative act. Furthermore, a rational basis for recognizing different levels of immunity for different levels of government in Texas can be articulated. *See infra* at 9-13.

In his misguided quest to create a false conflict between the opinions of the supreme courts of Alabama and Texas, Guillory fails to point out the Alabama recognizes different levels of immunity for different governmental entities performing identical functions. The same year it decided *Chandler* (holding that a *municipal* hospital has *no* immunity from tort suits), the Alabama Supreme

Court held that a hospital operated by a *state* university enjoys *absolute* immunity from tort liability. *Sarradett v. University of South Alabama*, 484 So.2d 426, 427 (Ala. 1986). There simply is no conflict between the judgment of the Texas Supreme Court and the Alabama Supreme Court, or any other state court of last resort for that matter.

Flax v. Kansas Turnpike Authority, 596 P.2d 446 (Kan. 1979) concerned a law granting full immunity to the Kansas Turnpike Authority for defects in the Kansas Turnpike when no other governmental unit – the state, counties, or municipalities enjoyed such immunity. *Id.* at 453-54. The Texas Tort Claims Act limits the level of immunity for The Port Authority in the same manner as it does for the state, all counties, and other state-created entities. *Guillory*, 845 S.W.2d at 815, n. 4.

Jenkins v. State of Washington, 540 P.2d 1363 (Wash. 1975) did not even address the question of different levels of immunity for the state and municipalities. The issue in that case involved limitations periods for filing suits against various governmental entities. 540 P.2d at 1367. The issue in this case concerns immunity from unlimited monetary damage awards, not a time of suit provision. No conflict exists, and Guillory's petition should be denied.

II. THE TEXAS TORT CLAIMS ACT'S LIMITED IMMUNITY FOR THE STATE AND STATE-CREATED ENTITIES SUCH AS THE PORT AUTHORITY DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. The Rational Basis Test Applies

Guillory indisputably is not a member of a suspect class and does not assert a claim based on a fundamental right. Accordingly, the rational basis test governs Guillory's equal protection claim. *See, e.g., Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 314 (1976). Under this test, the Texas Tort Claims Act's limited immunity provisions may not be overturned unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that this Court can only conclude that the legislature's actions were irrational. *Pennell v. San Jose,* 485 U.S. 1, 14 (1988).

The rational basis test is not difficult to establish. *Metropolitan Life Insurance Co. v. Ward,* 470 U.S. 869, 881 (1985). In areas of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect or result in some inequality. *Dandridge v. Williams,* 397 U.S. 471, 485 (1970). A classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. *See, e.g., Kadrmas v. Dickinson Public Schools,* 487 U.S. 450, 462 (1988).

The materiality of the relation between legislative action and the goal sought to be attained need not be scientifically substantiated under the rational basis test. *Matthews v. Lucas*, 427 U.S. 495, 510 (1976). The legislature need not articulate the law's purpose if a legitimate purpose can be hypothesized. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955). As long as there is a conceivable rational basis for the official action, it is immaterial that it was not *the* or *a* primary factor in reaching a decision or even that it was not actually relied upon by the decisionmaker. *See, McGinnis v. Royster*, 410 U.S. 263, 274-77 (1973).

The limited immunity provisions of the Texas Tort Claims Act in question are the type of economic regulation that can be characterized as a legislative effort to structure and accommodate "the burdens and benefits of economic life." *See, Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 83 (1978). The task of formulating these laws is not always easy, for as this Court has recognized: "the problems of government are practical ones and may justify, if they do not require, rough accommodation – illogical it may be and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 (1913). This is why the Equal Protection Clause of the Fourteenth Amendment permits states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

B. A Rational Basis Exists for a State to Establish One Level of Limited Immunity for Itself and State-Created Entities and Another Level of Limited Immunity for Municipalities

1. Texas has traditionally distinguished between units of government in recognizing immunity from tort claims

History is certainly relevant to determine what distinctions are consistent with the rights of equal protection. *Cohen v. Hurley*, 366 U.S. 117, 130 (1961). Traditionally, Texas has distinguished between units of government with respect to immunity from tort claims. Until the enactment of the Tort Claims Act, the state and other state-created entities were entirely immune from tort liability. *City of Austin v. Cooksey*, 570 S.W.2d 386, 387 (Tex. 1978). The Port Authority enjoyed the same absolute immunity from tort liability as did the state. *See Jones v. Texas Gulf Sulphur Co.*, 397 S.W.2d 304, 307 (Tex. Civ. App. – Houston 1965, writ ref'd n.r.e.); *Smith v. Harris County-Houston Ship Channel Navigation District*, 330 S.W.2d 672, 674 (Tex. Civ. App. – Fort Worth 1959, no writ); *Fylipoy v. Gulf Stevedore Corp.*, 257 F.Supp. 166 (S.D. Tex. 1966).

Historically, Texas has recognized a different level of tort immunity for municipalities. Prior to the enactment of the Texas Tort Claims Act, municipalities enjoyed absolute immunity from tort claims when municipalities engaged in governmental functions. *Turvey v. City of Houston*, 602 S.W.2d 517, 519 (Tex. 1980). Municipalities had no immunity when engaged in proprietary functions. *City of Austin v. Daniels*, 335 S.W.2d 753 (Tex. 1960).

The distinction between municipalities and other levels of government is not some arbitrary or fanciful creation of the legislature. Over a century ago, it was recognized that Texas municipalities are created by special charter chiefly for the benefit of their inhabitants while counties and other "quasi corporations" have been created by the legislature without reference to the wish of their inhabitants and thus for essentially public purposes. *City of Galveston v. Posnainsky,* 62 Tex. 118 (1884).

When the Texas legislature limited the immunity of the state and other state-created entities through the enactment of the Texas Tort Claims Act in 1969, it continued to recognize the historical immunity distinction between levels of government. Ever since its enactment, the Texas Tort Claims Act has had a provision excluding from application under the Act the proprietary functions of a municipality. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.058 (Vernon 1986) *repealed by* Act of June 16, 1987, 70th Leg. 1st C.S., ch. 2, 1987 Tex. Gen. Laws 37, 48 (current version Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(b) (Vernon Supp. 1992). The state and state-created entities continue to enjoy sovereign immunity except to the extent the Tort Claims Act creates liability. Tex. Civ. Prac. & Rem. Code Ann. § 101.025(a) (Vernon Supp. 1992). In other words, the legislature did not create a distinction between levels of government regarding immunity from tort liability – it preserved the historical difference.

2. The Distinctions Preserved By the Texas Legislature Satisfy the Rational Basis Test

Like most state tort claims acts permitting suits against the sovereign, the Texas Tort Claims Act represents an equitable balance between two state interests which by their nature compete against each other. On the one hand, the legislature has provided a remedy by which persons tortiously injured by the state or a state-created entity can seek compensation, where before they had no cause of action because of sovereign immunity. *Lynch v. Port of Houston Authority*, 671 S.W.2d 954, 959 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.). On the other hand, the legislature has limited the amount of such recoveries to assure that the financial viability of these state-created entities is not put in jeopardy because of this increased exposure. *See, e.g., Tarrant County Hospital District v. Ray*, 712 S.W.2d 271, 273 (Tex. App. – Fort Worth 1986, writ ref'd n.r.e.) (Tort Claims Act limitation on damages is not wholly irrelevant to the legislative goal of preserving governmental funds).

The state has an interest in the financial well-being and ultimate survival of The Port Authority and other state-created entities. The legislature created The Port Authority with the following public purpose in mind:

> [The development of deep water navigation . . . and to construct and maintain canals or waterways to permit of navigation or in aid thereof . . . [The Port Authority] is in urgent need for new and additional sources of revenue and means of financing so that the navigation improvement program of [The Port Authority] can be carried forward and continued and that

> *the State at large has a direct interest in such program . . .*

Act of June 14, 1927, 40th Leg. 1st C.S., ch. 97, 1927 Tex. Gen. Laws 256, *amended by* Act of April 29, 1957, 55th Leg., R.S., ch. 117, 1957 Tex. Gen. Laws 241, 253 (emphasis added).

Unlike ports controlled by the municipalities that created them, The Port Authority derives its powers at large from the Texas Constitution and specifically from the statutes governing the discharge of its duties. Op. Tex. Att'y Gen. No. JM-742 (1987). Section 59 of Article XVI of the Texas Constitution specifically empowers the legislature to pass all laws as may be appropriate for the navigation of the state's inland and coastal waters. Obviously, the state has a compelling interest in preventing state-created entities such as The Port Authority from being exposed to unlimited tort liability. As the Texas Supreme Court noted below, "any waiver (of immunity) exposes governmental units to increase liability, the burden of which must eventually be born by the general populace." *Guillory v. Port of Houston Authority,* 845 S.W.2d at 813. Similarly, the Texas Tort Claims Act provision precluding suits against the state and other state-created entities for exemplary damages is rationally related to the legitimate purpose of protecting the state treasury from having to pay punitive damages when only the taxpayers would be punished. *Lynch v. Port of Houston Authority,* 671 S.W.2d at 958.[1]

---

[1] The trial court's judgment against The Port Authority included $500,000 in exemplary damages. Pet'r App. at 16a. The Texas Tort Claims Act does not authorize exemplary damages.

In contrast to itself and entities it created, the state of Texas does not have the same interests when a public entity created by a local municipality is involved. The Texas legislature did not have a hand in the creation, financing or management of entities created by a local municipality. Any entity created by a local municipality was done so for the benefit of the local inhabitants, not for a state-declared public purpose. The Texas Supreme Court articulated this distinction as a rational basis for the limited immunity provision of the Texas Tort Claims Act. *Guillory*, 845 S.W.2d at 813-815.

3. The Legitimate Government Interests Supporting the Distinctions in the Texas Tort Claims Act Are Well-Recognized

The courts that have rejected equal protection claims akin to the one made by Guillory have recognized similar governmental interests to those supporting the distinctions contained in the Texas Tort Claims Act regarding immunity for different levels of government. *Grimes v. Pearl River Valley Water Supply District*, 930 F.2d 441 (5th Cir. 1991) considered a Mississippi statute immunizing a water district from tort liability. Even though other political subdivisions of Mississippi did not enjoy the same immunity, the court determined that it was rational for the Mississippi legislature to provide sovereign immunity for the water district in order to advance the legislative purpose of the agency and because the agency's source of

---

Tex. Civ. Prac. & Rem. Code. Ann. § 101.024 (Vernon Supp. 1992).

revenue was limited and must be used for purposes prescribed by the legislature. *Id.* at 444. *Kranson v. Valley Crest Nursing Home,* 755 F.2d 46 (3rd Cir. 1985) upheld the immunity distinction created for a municipally operated nursing home on the basis that immunity was necessary to encourage the establishment and operation of such homes and avoid the threat of damage suits. *Id.* at 53. Preserving a governmental entity's funds and fulfilling its public purposes are the same type of legitimate interests rationally related to the Texas Tort Claims Act's provisions limiting liability for the state and state-created entities such as The Port Authority. *See supra* at 11-13.

The historical distinction between state-created entities and municipalities in the area of immunity also has been recognized as a legitimate governmental interest to defeat an equal protection claim such as the one lodged by Guillory. *Obenshain v. Halliday,* 504 F. Supp. 946 (E.D. Va. 1980) concerned a Virginia law that provided immunity to counties but not to municipalities when their employees acted in a proprietary nature. The court held the law did not violate equal protection. Like the traditional distinction recognized in Texas, *Obenshain* observed that counties are created by the state and therefore are agencies of the state. Municipalities are created mainly for the interest, advantage and convenience of the locality and its people. *Id.* at 954. The court held this basic distinction was sufficient for equal protection purposes to justify the different levels of immunity for different levels of government. *Id.*

4. Drawing Demarcation Lines for Immunity According to What Function a Public Entity Serves Would Dismantle the Concept of Sovereign Immunity

Guillory mistakenly asserts that the only way for Texas to constitutionally grant varying levels of immunity to state-created entities is by "making immunity turn on the nature of the activity rather than the juridical origin of the entity." Petition for Writ at 3. Essentially, Guillory asks this court to sit as a super-legislature and redefine the rationally based distinctions between levels of government. This Court has consistently refused to usurp the traditional powers of the states in this area. *See, e.g., Martinez v. California,* 444 U.S. 277, 281-83 (1980) (the existence of tort remedies is generally a matter of state law); *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976) (per curiam) (Equal Protection Clause does not authorize judiciary to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines).

Moreover, Guillory's argument, if accepted, would result in the abolition of *all* sovereign immunity for the many states which apply different levels of immunity for different levels of government. Certainly, eliminating immunity for The Port Authority cannot occur without eliminating immunity for the state itself, as the state performs similar functions to those of municipalities. If immunity depends on the "function" performed, a state could not even draw a distinction between itself and a private entity performing the same function. As a result, states would be faced with unlimited liability for actual

and punitive damages anytime they built a road, constructed a dam or maintained a port facility. *See Guillory*, 845 S.W.2d at 814.

Because governmental units perform a variety of functions, Guillory's absurd "functional basis test" would force state governments to make a Hobson's choice between abolishing all sovereign immunity or immunizing all levels of government.[2] The rational basis test of the Equal Protection Clause does not require that this type of choice be made – it does not even contemplate it. *See, e.g., Heller v. Doe*, No. 92-351, (U.S. June 24, 1993) 1993 WL 218271, at *4 (rational basis review in equal protection analysis is not a license for the courts to judge the wisdom, fairness or logic of legislative choices). Guillory's petition should be denied.

CONCLUSION

The question that petitioner raises is neither special nor important. The judgment of the Texas Supreme Court involves no unsettled question of law and is entirely consistent with the prior rulings of this court and other

[2] Texas would not even be entitled to make the choice of immunizing all levels of government. The state constitution prohibits the legislature from abolishing causes of action that existed at common law. Tex. Const. art I, § 13; *Sax v. Votteler*, 648 S.W.2d 661, 664-65 (Tex. 1983). Because a common law right existed for a tort litigant to file suit for unlimited damages against a municipality engaged in proprietary functions, Guillory's "test" would require Texas to abolish all sovereign immunity.

federal circuit courts and state courts of last resort concerning the Equal Protection Clause of the Fourteenth Amendment. Accordingly, the petition should be denied.

Respectfully submitted,

REAGAN M. BROWN
Counsel of Record
JENNIFER BRUCH HOGAN
FULBRIGHT & JAWORSKI L.L.P.
1301 McKinney, Suite 5100
Houston, Texas 77010
(713) 651-5151

Attorneys for Respondent,
The Port of Houston Authority